

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JACK AND PAULINE MAST)

Appearances :

For Appellants Jack Mast, in pro. per.

For Respondent: F. Edward Caine, Senior Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on protests to proposed assessments of additional personal income tax in the amounts of \$86.16 assessed against appellants jointly for the year 1951, \$1,609.68 assessed against **Pauline Mast** for the year 1952 and \$1,589.44, \$27.19 and \$27.19 assessed against Jack Mast for the years 1952, 1953 and 1954, respectively.

Appellant Jack Mast (hereinafter called 'appellant') owned and operated Jack's Smoke Shop in San Francisco as a sole proprietor during 1951, 1952 and the first half of 1953. On July 1, 1953, appellant brought in a partner by the name of Morris Cooper and for the remaining portion of the period under appeal the Smoke Shop was operated as a partnership.

In addition to selling tobacco products, candy and other similar items, Jack's Smoke Shop, during the years under appeal, had available for the use of its customers two claw machines and five pinball machines owned by one Al Carr. The proceeds from each machine, after exclusion of expenses claimed by the Smoke Shop in connection with the operation of the machines, were divided equally between the Smoke Shop and Al Carr. Appellant also has admitted that he engaged in bookmaking

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activities (taking bets on horse races) at the Smoke Shop during the months of November and December in **1952**.

Respondent determined that all the business deductions of-the Smoke Shop, including payouts to winning bettprs, should be disailowed for the period from May 3, 1951, the effective date of section 17359 of the Revenue **and** Taxation Code, 'through 1 9 5 4 .

Section 17359 [now 17297) provided, in substance, that no deductions should be allowed on. income from certain defined illegal activities, or from **activities** that **tend** to promote or further or are associated or **connected** with the illegal activities. Bookmaking is one of the illegal activities so defined. (Penal Code, § 337a.)

Appellant admittedly engaged in an illegal bookmaking operation at the Smoke Shop during November and December **1952**. In addition, during the years in question, there were two claw machines and five pinball machines in operation at the Smoke Shop, **with** successful players of the claw machines withdrawing things of value from those machines.. We have previously held the operation of a claw machine to be illegal where a successful player obtains merchandise from the machine. (Appeal of Peter and Joy M. Perinati., Cal. St. Bd. of Equal., **April 6, 1961**, CCH Cal, Tax Rep. Par. **201-733**, P-H State & Local Tax Serv. Cal. Par. 58191.) In Appeal of Advance Automatic Sales Co., Cal. St. Bd. of Equal., **Oct. 9, 1962**, CCH Cal. Tax Rep. Par. **201-984**, P-H State & Local Tax Serv. Cal. Par. **13288**, we held the ownership or possession of a pinball machine to be illegal under Penal Code sections **330b, 330.1** and 330.5 if the machine was predominantly a game of, chance or **if** cash was paid to players for unplayed free games, and we also held bingo pinball machines to be predominantly **games** of chance. Although appellant did not specifically **name the** type of pinball machines he had, we conclude from the evidence that they were bingo pinball machines.

Since the bookmaking, claw machine and bingo pinball game phases of the business were illegal, respondent was correct in applying section 17359.

In reconstructing the income from bookmaking, respondent used the measure of gross receipts upon which the federal government had based its assessment against appellant. Appellant has not shown that this was erroneous. Respondent's computation

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of gross income appears to have a reasonable basis and we therefore accept its determination. (See Hetzel v. Franchise Tax Board, 161 Cal. App. 2d 224 [326 P.2d 6113].)

Tax returns filed by appellant and by the partnership indicate that illegal activities contributed a substantial percentage of the reported gross profit of Jack's Smoke Shop during each of the years under appeal. It is clear that the merchandising phase played a complementary role and was associated and connected with the illegal activities. Consequently, the expenses of the entire business were properly disallowed.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code that the action of the Franchise Tax Board on protests to proposed assessments of additional personal income tax in the amounts of \$86.16 assessed against appellants jointly for the year 1951, \$1,609.68 assessed against Pauline Mast for the year 1952 and \$1,589.44, \$27.19 and \$27.19 assessed against Jack Mast for the years 1952, 1953 and 1954, respectively, be and the same is hereby sustained.

Done at San Francisco, California, this 17th day of March, 1964, by the State Board of Equalization.

Paul R. Leake, Chairman
John W. Lynch, Member
William J. Lee, Member
Leo C. Healy, Member
_____, Member

ATTEST: [Signature], Secretary